IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

GLEICHER, P.J., JANSEN, AND SHAPIRO, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v.

GINO ROBERT REA,

Defendant-Appellee.

Supreme Court
Case No.: 153908

Court of Appeals
Case No.: 324728

Oakland County Circuit Court
Case No.: 14-250517-FH

DEFENDANT-APPELLEE'S SUPPLEMENTAL BRIEF IN OPPOSITION OF PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF JURISDICTION

The Michigan Supreme Court has jurisdiction over the instant proceeding pursuant to MCR 7.303(B)(1), which provides that the Supreme Court may review a case by appeal after a decision by the Court of Appeals.

STATEMENT OF QUESTION PRESENTED

I. DOES THE UPPER PORTION OF DEFENDANT-APPELLEE'S PRIVATE RESIDENTIAL DRIVEWAY, WHICH IS ENCOMPASSED WITHIN THE BACK-YARD AND/OR SIDE-YARD OF HIS RESIDENCE, CONSTITUTE "A HIGHWAY," "OTHER PLACE OPEN TO THE GENERAL PUBLIC," OR "[OTHER] [PLACE] GENERALLY ACCESSIBLE TO MOTOR VEHICLES," SO AS TO FALL WITHIN THE PURVIEW OF MCL 257.625?

Plaintiff-Appellant:	Yes.
Defendant-Appellee:	No.
Oakland County Circuit Court:	No.
Michigan Court of Appeals:	No.

STATEMENT OF FACTS

In the underlying criminal proceeding, Mr. Rea was charged with operating while intoxicated, in violation of MCL 257.625(1) (Third Offense Notice).[1] The charged offense stems from an incident that is alleged to have occurred on or about March 31, 2014, when Mr. Rea was arrested by officers of the Northville Police Department after they observed him operate his vehicle while intoxicated on the upper-portion of his private residential driveway, which is encompassed within the backyard and/or side-yard of his residence. Since the inception of the instant matter, there has been a dispute as to whether the area upon which Mr. Rea operated his vehicle constitutes an area that is "generally accessible to motor vehicles" under MCL 257.625(1).

A preliminary examination in this matter was held on May 9, 2014, and continued on May 30, 2014, at the 35th District Court before the Honorable James A. Plakas. The prosecution called a single witness at the preliminary examination: Officer Kenneth DeLano of the Northville Police Department. The preliminary examination testimony, which is pertinent to the issue before this Court, may be summarized as follows.[2]

Officer DeLano responded to Mr. Rea's residence three times on or about March 31, 2014 to investigate noise complaint(s) reported by Mr. Rea's neighbor. (PET, pp. 6-9.)

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1. Plaintiff-Appellant has consistently emphasized the fact that the Defendant-Appellee has several prior convictions. However, the number of Mr. Rea's prior convictions is simply not relevant to the determination of the issue(s) before the Court. The relevant inquiry is whether Mr. Rea's conduct occurred in an area within the purview of MCL 257.625. For purposes of this inquiry, it does not matter whether the instant charge constitutes Mr. Rea's first alleged violation of MCL 257.625 or his fifth.

2. The preliminary examination transcript is separated into two (2) volumes. All references to "PET" refer to the transcript of the initial preliminary examination date (May 9, 2014) and all references to "PET II" refer to the transcript of the continued preliminary examination, which was held on May 30, 2014. Specific references will be made to the relevant portion(s) of the pertinent transcript(s).

When Officer DeLano arrived at Mr. Rea's residence for the third time, he parked his patrol vehicle in the street in front of Mr. Rea's driveway. (PET, p. 21, 18-24.) The patrol vehicle blocked the entryway of Mr. Rea's driveway and precluded any and all vehicles from entering or exiting the driveway. (Id.) Officer DeLano thereafter allegedly observed Mr. Rea open his garage door and reverse his vehicle out of his garage and into the upper-portion of his residential driveway. (PET, p. 21, 12-13.) The vehicle stopped after traveling approximately twenty-five (25) feet down the driveway, and at that time, the vehicle was positioned between Mr. Rea's house and the fence separating his yard from his neighbor's yard. (PET, p. 10, 11-12; p. 11, 2-6; p. 15, 9-11.) Mr. Rea's vehicle was approximately fifty (50) feet from the roadway and approximately twenty-five (25) feet from his neighbor's house. (PET, p. 25, 8-13.) Mr. Rea never operated his vehicle in or near the street, nor did he ever cross or even come near the sidewalk. (PET, p. 28, 7-12.)

At the conclusion of the presentation of testimony at the preliminary examination, it was clear that the issue was whether the area upon which Mr. Rea was alleged to have operated his vehicle while intoxicated constituted an area "generally accessible to motor vehicles" under MCL 257.625(1). Specifically, the issue was whether Mr. Rea could be bound over on the charged offense for simply reversing his vehicle out of his garage and into the upper-portion of his residential driveway, which is encompassed within the backyard/side-yard of his residence. The court adjourned the matter and requested that the parties brief the issue. Arguments on the issue were heard on May 30, 2014.

The prosecution argued that Mr. Rea's private residential driveway was an area "generally accessible to motor vehicles," primarily relying on the conclusory statement made by the Court of Appeals in People v Campbell, that private driveways are "generally

accessible to motor vehicles."[3] People v Campbell, unpublished opinion per curiam of the Court of Appeals, issued May 13, 2008 (Docket No.: 274823). Defense counsel distinguished the facts of the present matter from the case(s) cited by the prosecution, and contended that Mr. Rea's private residential driveway does not constitute an area that is "generally accessible to motor vehicles." The district court judge expressed hesitation, stating, "I'll be brutally honest in that to me it's almost a flip of the coin," but ultimately decided to bind Mr. Rea over for trial on the charged offense, indicating:

> If you look at the term 'generally accessible to motor vehicles' and to then look at the facts of the Campbell case and pushing the standing argument aside you could almost take that and use it against Mr. Rea in this situation because it does show that – based in that court in this instance – those facts show that someone else was able to access somebody else's driveway. Because driveways, unless they have a gate across them, they are generally accessible to a motor vehicle. The prosecutor did make reference to sidewalks and people walking on sidewalks and potentially being hit by cars and sidewalks pass through driveways. And then there's 18 feet from beneath the driveway. I don't know if he went as far to reference the apron. Vehicles do drive up into driveways that aren't theirs, they do so to turn around when lost or they realize they're going in the wrong direction. It's a probable cause hearing and based on the standard that applies at a probable cause hearing I am going to bind-over in this matter.

(PET II, p. 15, 13-25; p. 16, 1-6.)

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3. In People v Campbell, supra, the Michigan Court of Appeals briefly addressed the applicability of MCL 257.625(1) to a defendant's operation of a vehicle on another individual's private driveway. However, the factual circumstances presented in Campbell are wholly distinguishable from those of the instant matter, and therefore, Campbell, an unpublished decision, should not be considered controlling authority.

The matter was subsequently bound over to the Oakland County Circuit Court and assigned to the Honorable Colleen O'Brien. On or about August 26, 2014, counsel for Defendant filed a Motion to Quash with the court, wherein it was argued that the district court erred in binding the defendant over for trial because the upper-portion of Mr. Rea's private residential driveway, which is encompassed within the backyard/side-yard of his residence, does not constitute an area "generally accessible to motor vehicles."

An evidentiary hearing was held on October 17, 2014.[4] Officer DeLano was the only witness called to testify at the hearing. Officer DeLano testified that he parked his vehicle at the end of Mr. Rea's driveway when responding to the third dispatch, and observed Mr. Rea reverse his vehicle approximately twenty-five (25) feet from his garage, thereby positioning his vehicle "pretty close to the front of the house." (EHT, p. 24, 13-15; pp. 17-18.) Officer DeLano approached the vehicle and initiated contact with Mr. Rea behind the fence-line, which is encompassed within the backyard and/or side-yard of Mr. Rea's residence. (EHT, p. 25, 2-17.) Officer DeLano testified that Mr. Rea's vehicle never crossed the fence-line or the front of Mr. Rea's house, and further, that Mr. Rea's vehicle never left the upper-portion of his driveway, which is encompassed within his backyard/sideyard.[5] (EHT, p. 26, 8-10; p. 30, 8-12; p. 32, 10-12.) Furthermore, Officer

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4. All references to "EHT" contained herein refer to the transcript of the evidentiary hearing held before the Honorable Colleen O'Brien at the Oakland County Circuit Court on October 17, 2014. The parties stipulated to the admission of certain photographs and a survey depicting the relevant area(s) at the hearing. Copies of said exhibits ("Exhibits A-F") are annexed hereto as Appendix A. Officer DeLano confirmed, by way of testimony, that the aforementioned photographs accurately depict the layout of Mr. Rea's property. (EHT, pp. 22-24; pp. 27-30.)

5. Plaintiff-Appellant has consistently argued that Mr. Rea's operation did not occur in the backyard and/or side-yard of his residence, but rather simply occurred "on his paved driveway connecting his detached garage to the street." (Plaintiff-Appellant's Application for Leave to Appeal, p. 17.) Plaintiff-Appellant has asserted that any argument by Defendant-Appellee regarding the area of operation is "misleading." (Id.) Plaintiff-Appellant's assertions are simply inaccurate. The record conclusively

DeLano testified that Mr. Rea never operated his vehicle on the public street or on private property other than his own. (EHT, p. 30, 8-22.)

At the conclusion of testimony, the prosecution argued that the Motion to Quash should be denied, once again citing the conclusory statement set forth by the court in People v Campbell, supra, that private driveways are "generally accessible to motor vehicles." (EHT, p. 35, 1-18.) Defense counsel distinguished Campbell from the present matter and argued the points set forth in Defendant's Motion to Quash. (EHT, pp. 38-40.) A written opinion was issued by the circuit court on October 30, 2014. The Honorable Colleen O'Brien concluded that the upper-portion of Mr. Rea's private residential driveway did not constitute an area that is "generally accessible to motor vehicles" under MCL 257.625(1) and granted Defendant's Motion to Quash. [6]

The prosecution subsequently filed a claim of appeal with the Michigan Court of Appeals. The prosecution argued that it was error for the circuit court to grant Defendant's Motion to Quash. The parties submitted briefs to the Court of Appeals and oral argument was heard on February 9, 2016. On April 19, 2016, the majority of the Court of Appeals rendered a decision affirming the circuit court's decision granting Defendant's Motion to Quash. People v Rea, __ Mich App __ (2016) (Docket No.: 324728). The majority held that the circuit court's decision was proper due to the fact that the prosecution failed to

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establishes that at all times relevant hereto Mr. Rea's vehicle was located within the back-yard and/or side-yard of his residence. See EHT, p. 26, 11-13 (*Counsel for Defendant*: "At all times he was either in his side yard or in his own backyard, correct?" *Officer DeLano*: "Yes, sir.")

6. The circuit court distinguished the cases relied on by the prosecution from the matter before the court, indicating that "the upper portion of Defendant's private residential driveway, which is encompassed within his backyard/sideyard, cannot be compared to a pit area of a speedway [as] [in] [Nickerson]" and, "Defendant operated his vehicle on his own property, whereas in Campbell the defendant's operation of his vehicle did not take place on his own, private, residential property." See Opinion and Order, dated October 30, 2014.

establish probable cause to believe that Defendant operated a vehicle upon "[a] place generally accessible to motor vehicles." Rea, __ Mich App at __; slip op at 3. The majority noted that Defendant merely drove his vehicle from his garage to a point in his private driveway in line with his house and that the relevant portion of the Defendant's private driveway is only accessible "to a small subset of the universe of motor vehicles, including those belonging to the homeowner or those using the driveway with permission." Rea, __ Mich App at __; slip op at 4. In concluding that the relevant portion of the Defendant's driveway does not constitute an area "generally accessible to motor vehicles," the majority emphasized that the plain language of the statute indicates that the Legislature did not intend to prohibit the offense in "every place in which it is physically possible to drive a car," and further, that the term "generally" modifies the word "accessible," which indicates that the Legislature meant to limit the reach of statute. Id. at __; slip op at 4. The dissenting opinion, authored by the Honorable Kathleen Jansen, held that "whether the upper portion of defendant's private driveway was generally accessible to motor vehicles is a question of fact for the trier of fact to determine after hearing the evidence in the case." Rea, __ Mich App at __, slip op at 1 (JANSEN, J., dissenting).

Plaintiff-Appellant subsequently filed an Application for Leave to Appeal with this Court, requesting that this Court peremptorily reverse the majority decision of the Court of Appeals, or alternatively, grant leave to appeal. (Plaintiff-Appellant's Application for Leave to Appeal, p. 19.) Plaintiff-Appellant contends that "the majority decision from the Michigan Court of Appeals [was] clearly erroneous and will result in a miscarriage of justice" "because defendant's actions fell within the plain language of MCL 257.625(1)," and further, because "[the] [majority] failed to give effect to the plain meaning of the phrase

'generally accessible to motor vehicles.' " (Application, p. 8; p. 10.) Defendant-Appellee filed a Brief in Opposition of Plaintiff-Appellant's Application for Leave to Appeal, wherein Defendant-Appellee argued that the majority decision of the Michigan Court of Appeals was correctly decided and will not result in "material injustice" if allowed to stand because the upper-portion of Defendant-Appellee's private residential driveway, which is encompassed within the back-yard/side-yard of his residence, does not constitute an area "generally accessible to motor vehicles" under MCL 257.625.

On September 29, 2016, the Michigan Supreme Court issued an Order indicating that the Court has decided to consider the Application for Leave to Appeal. The Court instructed the parties to submit supplemental briefs addressing whether the location where Mr. Rea operated a vehicle on the date in question is a place within the purview of MCL 257.625. Defendant-Appellee submits the instant (supplemental) brief in accordance with this Court's order.

As the following analysis will indicate, Defendant-Appellee merely operated his vehicle on the upper portion of his private residential driveway, which is encompassed within the back-yard and/or side-yard of his residence, and such an area does not fall within the purview of MCL 257.625. Accordingly, Defendant-Appellee respectfully requests that this Court decline to grant the relief sought by Plaintiff-Appellant and affirm the decision of the majority of the Michigan Court of Appeals.

ARGUMENT

I. THE UPPER PORTION OF DEFENDANT-APPELLEE'S PRIVATE RESIDENTIAL DRIVEWAY, WHICH IS ENCOMPASSED WITHIN THE BACK-YARD OR SIDE-YARD OF HIS RESIDENCE, DOES NOT CONSTITUTE A PLACE WITHIN THE PURVIEW OF MCL 257.625, AND THEREFORE THIS COURT SHOULD AFFIRM THE DECISION OF THE MICHIGAN COURT OF APPEALS.

A. STANDARD OF REVIEW

A trial court's decision to quash an information is reviewed for an abuse of discretion. People v Dowdy, 489 Mich 373, 379; 802 NW2d 239 (2011). An abuse of discretion occurs when the trial court "chooses an outcome that falls outside the range of principled outcomes." People v Musser, 494 Mich 337, 348; 835 NW2d 319 (2013). However, "[t]his Court reviews de novo questions of statutory interpretation." People v Gardner, 482 Mich 41, 46; 753 NW2d 78 (2008). Thus, "[t]o the extent that a lower court's decision on a motion to quash the information is based on an interpretation of the law, appellate review of the interpretation is de novo." People v Miller, 288 Mich App 207, 209; 795 NW2d 156 (2010).

B. DISCUSSION

Defendant-Appellee was originally charged in the underlying criminal proceeding with one (1) count of operating while intoxicated, contrary to MCL 257.625(1). The statutory prohibition against operating while intoxicated is set forth in MCL 257.625(1), which provides in pertinent part:

> A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person is operating while intoxicated.

The above-cited statutory provision sets forth three specific and distinct areas upon which operating a vehicle while intoxicated is prohibited, including: (1) "a highway," (2) "other place open to the general public," or (3) "[other] [place] generally accessible to motor vehicles." MCL 257.625(1); People v Nickerson, 227 Mich App 434, 440; 575 NW2d 804, 807 (1998) (noting that the locations enumerated within MCL 257.625(1) constitute distinct and alternative places where driving a vehicle while under the influence of liquor is prohibited). Accordingly, in order to sustain the cahrge of operating while intoxicated, the prosecution must establish that the operation of a motor vehicle occurred upon or within one of the aforementioned locations.[7]

The issue pending before this Court is whether the upper-portion of Defendant-Appellee's private residential driveway, which is encompassed within the back-yard and/or side-yard of his residence, constitutes: (1) "a highway," (2) "other place open to the general public," or (3) "[other] [place] generally accessible to motor vehicles," under MCL 257.625(1). It is seemingly undisputed that the area in question does not fall within the definition of "a highway" or "other place open to the general public." [8] Whether the area

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7. The area of operation is an essential element of the criminal offense of operating while intoxicated under MCL 257.625(1). Accordingly, a conviction cannot be sustained absent proof beyond a reasonable doubt that the operation occurred upon one of the areas specified by statute. See M Crim JI 15.2.

8. A private residential driveway does not fall within the definition of "highway" under the Michigan Vehicle Code. See MCL 257.20 ("Highway" means "the entire width between the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel.") In addition, the upper portion of Mr. Rea's private residential driveway is not a place that is "open to the general public." See, e.g., People v Hawkins, 181 Mich App 393, 397; 448 NW2d 858, 860 (1989) (internal citations omitted) (holding that a shopping center parking lot is a place "open to the general public " and noting that "[t]he terms 'open to the public' and to which 'the public has access' [in drunk driving statutes] are usually held to be broad enough to cover parking lots of restaurants, shopping centers, and other areas where the public is invited to enter and conduct business"); People v Tracy, 18 Mich App 529, 532; 171 NW2d 562, 564 (1969) (holding that lawn in front of dormitory on campus of a state university is a "place open to the general public"); see also, PET II, pp. 15-16; EHT p. 32, 10-12.

of alleged operation falls within the purview of MCL 257.625(1) - that is, whether the area in question constitutes a place that is "generally accessible to motor vehicles" - is a question of statutory interpretation.

The primary goal of statutory interpretation is "to ascertain and give effect to the intent of the Legislature." People v Pasha, 466 Mich 378, 382; 645 NW2d 275 (2002); People v Cole, 491 Mich 325, 330; 817 NW2d 497 (2012). Generally, the intent of the Legislature may be discerned from the plain language of the statute. In re Receivership of 11910 South Francis Rd (Price v Komalski), 492 Mich 208, 222; 821 NW2d 503 (2012). If a statute is unambiguous, the court presumes that the Legislature intended the meaning plainly expressed, and further judicial construction is neither permitted nor required. DiBenedetto v West Shore Hosp, 461 Mich 394, 402; 605 NW2d 300 (2000). However, if a statute is "ambiguous on its face[,] so that reasonable minds could differ with respect to its meaning, judicial construction is appropriate to determine the meaning." In re MCI Telecommunications Complaint, 460 Mich 396, 411; 596 NW2d 164 (1999).

The words used in a statute are the "most reliable indicator" of legislative intent and should be "interpreted based on their ordinary meaning and the context within which they are used in the statute." People v Lowe, 484 Mich 718, 721-22; 773 NW2d 1 (2009); see also, People v Gardner, 482 Mich at 50 ("The touchstone of legislative intent is the statute's language.") If a term is not expressly defined in the statute, it is permissible to consult dictionary definitions in order to aid in construing the term in accordance with its ordinary and generally accepted meaning. People v Lange, 251 Mich App 247, 253; 650 NW2d 691 (2002).

When interpreting a statute, the court must avoid interpretations that would render

any part of the statute surplusage or nugatory. Zwiers v Growney, 286 Mich App 38, 44; 778 NW2d 81 (2009); Pittsfield Charter Tp v Washtenaw Co, 468 Mich 702, 714; 664 NW2d 193, 199 (2003) ("Every word of a statute should be given meaning and no word should be treated as surplusage or rendered nugatory if at all possible.") Resistance to treating statutory words or phrases as mere surplusage "should be heightened when the words describe an element of a criminal offense." Ratzlaf v United States, 510 US 135, 140-41 (1994). Furthermore, a court should not read anything into a statute that is not within the manifest intent of the Legislature as indicated by the act itself. Book-Gilbert v Greenleaf, 302 Mich App 538, 541-542; 840 NW2d 743 (2013) (noting "[w]hen the Legislature fails to address a concern in the statute with a specific provision, the courts cannot insert a provision simply because it would have been wise of the Legislature to do so to effect the statute's purpose[.]"); see also, Pascals v Berrien County Prosecutor, 138 Mich App 561; 360 NW2d 243 (1984) (It is the task of the Legislature to define criminal offenses and courts are not to infer, based on judicial ideas as to proper policy, the existence of crimes not defined by statute.); People v Silver, 302 Mich 359, 4 NW2d 687 (1942) (Statutes applicable to criminal matters may not be extended beyond their plain terms by judicial construction to include those acts which possibly should, but are not, included within their terms.)

As the following analysis will indicate, the upper portion of Defendant-Appellee's private residential driveway does not constitute an area upon which the Legislature intended to criminalize the operation of a vehicle while intoxicated. Construing MCL 257.625(1) to encompass the relevant area of operation would be contrary to the plain language of the statute and the expressed legislative intent. Accordingly, Defendant-

Appellee requests that this Court decline to grant the relief sought by Plaintiff-Appellant and affirm the decision of the majority of the Michigan Court of Appeals.

1. AN ANALYSIS OF THE PLAIN LANGUAGE OF MCL 257.625(1) INDICATES THAT THE UPPER-PORTION OF DEFENDANT-APPELLEE'S PRIVATE RESIDENTIAL DRIVEWAY, WHICH IS ENCOMPASSED WITHIN THE BACK-YARD AND/OR SIDE-YARD OF HIS RESIDENCE, DOES NOT CONSTITUTE AN AREA THAT IS "GENERALLY ACCESSIBLE TO MOTOR VEHICLES."

The primary goal when interpreting a statute is to determine and facilitate the intent of the legislature. In re Forfeiture of $5,264, 432 Mich 242; 439 NW2d 246 (1989). The words used in a statute are the "most reliable indicator of legislative intent" and should be interpreted based on their "ordinary meaning and the context in which they are used in the statute." People v Lowe, 484 Mich at 721-22. In interpreting statutes, words are to be given their common and generally accepted meaning. People v Denio, 454 Mich 681, 698; 564 NW2d 13 (1997).

The Legislature did not define what constitutes an "[other] [place] generally accessible to motor vehicles," and therefore it is permissible to consult dictionary definitions in order to aid in construing the terms in accordance with their ordinary and generally accepted meanings. People v Lange, 251 Mich App at 253. The term "generally" is commonly defined as "in most cases," "by or to most people," "in disregard of specific instances and with regard to an overall picture," "popularly," "extensively," or "widely." *Merriam-Webster*, n.d. Web. 01 Nov. 2016; *Webster's New World Dictionary of the American Language* (2d College ed), p. 581. The term "accessible" is commonly defined as "able to be reached or approached" and the term "access" is typically defined as "the ability, right or permission to approach [or] enter." *Merriam-Webster*, n.d. Web. 01 Nov.

2016.

The inclusion of the adverb "generally" within the statute evidences a legislative intent to limit the applicability of the provision to areas where access is not restricted or confined to a privileged group or limited number of individuals, as it is the seemingly unrestricted number of potential users that renders an area "generally" accessible. The language utilized by the Legislature signifies an intent not to preclude the operation of a vehicle while intoxicated in all areas merely accessible to motor vehicles.[9] Robinson v City of Detroit, 462 Mich 439, 459; 613 NW2d 307, 318 (2000) ("Each word of a statute is presumed to be used for a purpose, and, as far as possible, effect must be given to every clause and sentence.")

An analysis of the common definitions of "generally" and "accessible" indicates that the upper portion of Mr. Rea's private residential driveway does not constitute an area that is "generally accessible to motor vehicles" within the meaning of MCL 257.625. The area upon which Mr. Rea allegedly operated his vehicle on the date in question is located within the back-yard and/or side-yard of his residence. (PET, p. 10, 11-2; p. 11, 2-6; p. 15, 9-11; p. 25, 8-13.) The relevant area is in close proximity to Mr. Rea's private residence and is a significant distance away from the portion of the driveway upon which vehicles may attempt to enter should they use a driveway to turn around. Id. Operators of motor vehicles have no affirmative right or implied permission to use the relevant area of Mr.

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9. As aptly noted by the Michigan Court of Appeals, if the Legislature wanted to criminalize driving while intoxicated in one's own driveway, "it could have outlawed the operation of a motor vehicle in *any* place 'accessible to motor vehicles,' omitting the adverb 'generally.'" Rea, ___ at ___; slip op at 4. The court continued, "[b]ut the statute uses the word 'generally' to modify the word 'accessible,' and the combined modifier to further describe 'other place.' The commonly understood and dictionary-driven meanings of the term 'generally' in this context compel the conclusion that the Legislature meant to *limit the reach* of MCL 257.625(1)." Id. (Emphasis supplied.)

Rea's private residential driveway in the same sense as they might drive through or use a private parking lot by custom.[10] No reasonable operator would believe that he or she had access to the area in question, as the same parallels Mr. Rea's residence and is located behind the fence line. (EHT, p. 26, 8-13.) See Appendix A. Given the inherently private nature of the area in question, it is highly unlikely that an unrestricted number of operators of motor vehicles would even ever attempt to access the same, notwithstanding the fact that entry is not precluded by a physical barrier. [11]

In addition, it is unlikely that the relevant portion of Mr. Rea's driveway would be used "widely" or "extensively" by operators of motor vehicles due to the fact that it parallels his residence, is encompassed within his back-yard and/or side-yard, his street is a dead-end, his driveway abuts a cul-de-sac, and further, his residential street neither contains, nor leads to any businesses or other public accommodations. Furthermore, on the date in question, Officer DeLano parked his patrol vehicle at the end of Mr. Rea's driveway, thereby blocking the entryway and effectively precluding any and all vehicles from entering

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10. An analysis of the statutory definition of "private driveway" contained within the Michigan Vehicle Code further supports such an argument. "Private driveway" is defined as "any piece of privately owned and maintained property, which is used for vehicular traffic, but is not open or normally used by the public." MCL 257.44(1). While a private driveway is used for vehicular traffic, it is not "open or normally used" by an unrestricted or unlimited number of drivers. The definition of private driveway should be read in connection with the definition of private road. "Private road" is defined as a road, "which is normally open to the public and upon which persons other than the owners located thereon may also travel." MCL 257.44(2). Thus, a private driveway, by definition, is not "generally accessible to motor vehicles" because operators of vehicles other than the owners of the driveway may not generally travel thereon and access is restricted to a select group of individuals.

11. The prosecution has consistently argued that the lack of a physical barrier preventing entry to and/or exit from the area in question renders the same "generally accessible." (Application, p. 13.) However, the prosecution ignores the fact that "access" is not limited to the physical ability to enter an area. As indicated by the Court of Appeals, the fact that "other vehicles had the ability to enter the area" is irrelevant, as "physical ability" to enter is "not the touchstone of general accessibility." Rea, ___ Mich App at ___; slip op at 4. An area is not "accessible" merely because an individual has the physical ability to enter the same, rather an area may be deemed "inaccessible" due to the fact that an individual does not have permission (express or implied) to enter the area.

or exiting the driveway. (PET, p. 21, 18-24.) Thus, at the time Mr. Rea operated his vehicle on the upper-portion of his residential driveway, the entirety of his driveway was not even "accessible" to motor vehicles by any means.

As indicated by the above, the upper portion of Mr. Rea's private residential driveway, which is encompassed within the back-yard and/or side-yard of his residence, is not "able to be used or entered" "by or to most people" or "in most cases." Instead, access to, and use of, this area is significantly restricted and only a privileged few have access to the same. Accordingly, the relevant area does not constitute an area that is "generally accessible to motor vehicles" under MCL 257.625.

2. INTERPRETING THE RELEVANT STATUTORY PROVISION TO CRIMINALIZE THE OPERATION OF A VEHICLE WHILE INTOXICATED UPON THE UPPER PORTION OF DEFENDANT-APPELLEE'S PRIVATE RESIDENTIAL DRIVEWAY, WHICH IS CONTAINED WITHIN THE SIDE-YARD AND/OR BACK-YARD OF HIS PRIVATE RESIDENCE, WOULD BE CONTRARY TO THE EXPRESSED INTENT OF THE LEGISLATURE AND THEREFORE THE COURT SHOULD DECLINE TO EXTEND THE STATUTE TO ENCOMPASS THE AREA IN QUESTION.

MCL 257.625 should be interpreted in a manner that is consistent with the expressed legislative intent. In re Forfeiture of $5,264, supra ("Statutes must be read so as to facilitate the intent of the legislature.") Generally, the intent of the Legislature may be discerned from the plain language of the statute. In re Receivership of 11910 South Francis Road (Price v Komalski), 492 Mich at 222. When interpreting a statute, the court is to examine the statutory language as a whole to determine the Legislature's intent. Madugula v Taub, 496 Mich 685, 696; 853 NW2d 75 (2014).

MCL 257.625(1) contains a prohibition against operating a vehicle while intoxicated and expressly sets forth three specific areas upon which the operation of a vehicle while

intoxicated is prohibited, including: (1) "a highway," (2) "[a] place open to the general public," or (3) "[other] [place] generally accessible to motor vehicles." MCL 257.625(1). The specific enumeration of distinct areas upon which operating while intoxicated is prohibited within the statutory provision is particularly probative of legislative intent. It evidences a clear legislative intent not to criminalize the operation of a vehicle while intoxicated in all areas within the state, and further, it is indicative of an intent to only criminalize such conduct when it occurs upon or within one of the distinct areas specifically referenced within the statute.

An analysis of the language and structure of the statute indicates that the Legislature did not intend to criminalize the operation of a vehicle while intoxicated in all areas within the state. If the Legislature intended to criminalize such conduct in all areas within the state it could have, and likely would have, drafted MCL 257.625(1) to state: A person, whether licensed or not, shall not operate a vehicle *"within this state"* if the person is operating while intoxicated. However, the Legislature consciously made a decision not to utilize such language and instead chose to specifically set forth certain areas upon which it intended to prohibit operating a vehicle while intoxicated.

The Legislative intent not to prohibit operation of a vehicle while intoxicated in all areas within the state is further evidenced by the following two points. First, shortly after the Legislature amended MCL 257.625(1) to prohibit the operation of a vehicle while intoxicated upon areas "generally accessible to motor vehicles," the Legislature enacted MCL 257.625m, which expressly prohibited the operation of a commercial motor vehicle

while intoxicated "*within the state*." [12] This is significant because it indicates that the Legislature was aware that it had the ability to extend the prohibition against drunk driving contained within MCL 257.625(1) to all areas within the state, but declined to do so. Second, the Legislature did not adopt the model statutory language contained within the Uniform Vehicle Code seemingly in effect at the relevant time, which proscribed the operation of a vehicle while intoxicated "on highways and elsewhere throughout the state."[13] See Uniform Vehicle Code and Model Traffic Ordinance, *National Committee on Uniform Traffic Laws and Ordinances* (1968): §11-101(2); §11-902(a). In light of the structure and content of the express statutory language and the Legislature's knowledge that it could prohibit the operation of a vehicle in all areas within the state, it is reasonable to conclude that the Legislature did not intend to prohibit the operation of a vehicle while intoxicated in all areas within this state under MCL 257.625.

The specific enumeration by the Legislature of areas where operation of a vehicle while intoxicated is prohibited implies that there are certain areas that the Legislature intended to exclude from the prohibition set forth in MCL 257.625. The upper portion of

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12. House Bill 4351, which sought to amend the Vehicle Code to prohibit individuals from operating a commercial motor vehicle with a specified blood alcohol content within the state, was introduced during the same legislative session as House Bill 4828, which sought to amend MCL 257.625(1) to prohibit the operation of a vehicle while intoxicated upon areas "generally accessible to motor vehicles." House Bill 4351 was expressly intended to impose "more stringent drunk-driving standards for drivers of commercial vehicles." See Appendix B - House Legislative Analysis, dated May 9, 1991.

13. The Uniform Vehicle Code is a "specimen set of motor vehicle laws, designed and advanced as a comprehensive guide or standard for state motor vehicle and traffic laws." Uniform Vehicle Code and Model Traffic Ordinance, *National Committee on Uniform Traffic Laws and Ordinances* (1968). The Michigan Legislature is said to have modeled other aspects of the operating while intoxicated provision(s) under the Michigan Vehicle Code in accordance with the language set forth in the Uniform Vehicle Code. See People v Pomeroy, 419 Mich 441, 453; 355 NW2d 98, 103 (1984). Accordingly, it is fair and reasonable to assume that the Legislature was aware of the language contained within the Uniform Vehicle Code and consciously declined to adopt the same.

Mr. Rea's private residential driveway, which is encompassed within the side-yard and/or back-yard of his residence, appears to be one such area.[14] The relevant area of operation is in close proximity to Mr. Rea's private residence and is contained within the curtilage surrounding the same. It is an area that is so intimately associated with Mr. Rea's home that it is unreasonable to conclude that the Legislature intended such an area to fall within the meaning of an area "generally accessible to motor vehicles" under MCL 257.625(1).[15] The exclusion of the relevant area is consistent with principles of established law, as the home and the curtilage have always received a greater degree of protection from

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14. It is relevant to note that courts of other jurisdictions have also concluded that their respective OWI statutes, which contain different language than the statute at issue, do not apply to private residential driveways. See, e.g., Com v Virgilio, 79 Mass App Ct 570, 947 NE2d 1112 (2011) (private residential driveway that served two residences did not constitute "[a] way or [a] place to which the public has a right of access" or " [a] way or [a] place to which members of the public have access as invitees or licensees"); State of Nebraska v McCave, 282 Neb 500 (2011) (defendant's vehicle, which was located on a residential driveway and overhanging a public sidewalk, was not operated on "private property that is open to public access"); State v Knott, 132 Idaho 476, 974 P2d 1105 (1999) (residential driveway was not "private property open to the public" despite the fact that social guests and persons with business at the residence are permitted to use the driveway).

15. Plaintiff-Appellant has consistently argued against excluding such a private area from the scope of MCL 257.625(1) and cites Lynch v Commonwealth, 902 SW2d 813 (1995) in support of such an argument. However, Lynch has no bearing on the issue before the Court, as the Kentucky Legislature made a conscious decision to prohibit drunk driving in "all areas within the state," and thereby subverted an individual's property rights in a legislative attempt to protect the general welfare. The Michigan Legislature has expressly declined to prohibit operating while intoxicated in all areas within the state and therefore this court should decline to construe MCL 257.625(1) to authorize governmental interference with Mr. Rea's exclusive use of the relevant portion of his private property. An analysis of other provisions of the Michigan Vehicle Code further indicates that the statute should not be construed to permit governmental interference with, or enforcement of certain provisions in contravention of, an individual's private property rights. See, e.g., MCL 257.607 ("Nothing in [the] [vehicle code] shall be construed to prevent the owner of real property used by the public for purposes of vehicular travel by permission of the owner and not as a matter of right from prohibiting such use nor from requiring other or different or additional conditions than those specified in this act or otherwise regulating such use as may seem best to such owner."); MCL 257.601a (owner of private road open to the general public may contract with government to enforce provisions of code on private road); see also, City of Detroit v Ft Wayne & E Ry Co, 90 Mich 646, 654; 51 NW 688, 690 (1892) ("The right of public supervision and control of highways results from the power and duty of providing and preserving them.")

governmental interference and/or intrusion. [16] Furthermore, given the inherently private nature of the area in question, it is likely that the Legislature would have expressly indicated that operating while intoxicated is prohibited in such an area, due to the fact that the area does not directly fit within the meaning of a "highway," "[a] place open to the general public," or "[a] [place] generally accessible to motor vehicles" under MCL 257.625(1). In addition, it is relevant to note that the Michigan Vehicle Code does not appear to contain any provisions that expressly regulate the operation of a vehicle in such a private area. See, e.g., MCL 257. 1, *et. seq.*

The exclusion of the area in question from the prohibition set forth in MCL 257.625(1) is further supported when considered in light of the underlying purpose of the statute. The general purpose of the operating while intoxicated statute is to "protect the *general public* from persons who drive while intoxicated." People v Hawkins, 181 Mich App at 397; People v Tracy, 18 Mich App at 532. [17] The nature of the specific areas set forth

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16. See, e.g., United States v Orito, 413 US 139, 142; 93 S Ct 2674, 2677; 37 L Ed 2d 513 (1973)(noting that "the Constitution extends special safeguards to the privacy of the home" and that certain activities may be lawfully conducted within the confines of a home, but may be prohibited in public); Payton v New York, 445 US 573, 589; 100 S Ct 1371, 1381–82; 63 L Ed 2d 639 (1980) ("The Fourth Amendment protects the individual's privacy in a variety of settings," but "[i]n none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home."); Oliver v United States, 466 US 170, 180, 104 S Ct 1735, 80 LEd2d 214 (1984) (noting that "the land immediately surrounding and associated with the home" is entitled to the constitutional protections that attach to the home itself); Kyllo v United States, 533 US 27, 31; 121 S Ct 2038, 150 LE2d 94 (2001), quoting Silverman v United States, 365 US 505, 511, 81 S Ct 679, 5 LEd2d 734 (1961) ("'At the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'")

17. See also, People v O'Neal, 198 Mich App 118; 497 NW2d 535 (1993) (noting that the purpose of the Michigan Vehicle Code is to protect citizens and vehicles while on public highways); People v Rogers, 438 Mich 602, 620–21; 475 NW2d 717, 724 (1991) (noting that "the OUIL statute is intended to prevent accidents and hazards on the state's highways caused by the improper conduct of intoxicated drivers," and further, "the purpose of the Motor Vehicle Code is to protect citizens and vehicles while on the public highways."); Crampton v 54-A Dist Judge, 397 Mich 489, 509; 245 NW2d 28, 36 (1976) (noting that the purpose of the DUIL law is to protect the travelling public against danger from drivers not in full control of themselves).

by the Legislature in the relevant statute evidences an intent to limit the applicability of the prohibition against operating while intoxicated to areas where the public safety is at risk. It is reasonable to conclude that the Legislature did not intend to criminalize the operation of a vehicle while intoxicated in areas that are so inherently private in nature, such as the upper portion of a private residential driveway, as the safety of the general public is not implicated by conduct exclusively engaged in within such an area.[18]

The prosecution has consistently argued that the upper portion of Mr. Rea's private residential driveway, which is encompassed within the side-yard and/or back-yard of his residence, constitutes an area that is "generally accessible to motor vehicles." However, if the court were to adopt the argument(s) advanced by the prosecution and construe the relevant statutory phrase to encompass the area in question, the specific enumeration of distinct areas within MCL 257.625(1) would be rendered meaningless, as there would be no area within the state where the statute would not apply.[19] See State Farm Fire & Cas

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18. The issue of public safety is not implicated in such an area because other individuals are not generally permitted enter or use the area in question. The Michigan Court of Appeals seemingly recognized the same in the underlying proceeding. The court indicated, "[w]e note that our analysis would be different had defendant driven intoxicated in the driveway or an apartment building or other community living center, if defendant's property shared its driveway with the neighboring property, or if defendant proceeded to an area of his driveway where he could encounter a member of the general public." Rea, ___ Mich App at ___; slip op at 4, n 2. Furthermore, even if an individual were to enter the area in question without Mr. Rea's consent and was subsequently injured by the operation of the vehicle in question, it is likely that said individual would be unable to recover on a negligence theory, as an owner of property generally owes no duty of care to a trespasser and is generally not liable to a trespasser for physical harm caused by his or her failure to exercise reasonable care to carry on activities on his or her property in a manner so as not to endanger trespassers. See, e.g., James v Alberts, 464 Mich 12; 626 NW2d 158 (2001); Sanders v Perfecting Church, 303 Mich App 1; 840 NW2d 401 (2013); Kroll v Katz, 374 Mich 364; 132 NW2d 27 (1965); Chamberlain v Haanpaa, 1 Mich App 303; 136 NW2d 32 (1965).

19. The relevant statutory phrase must be considered in light of the statutory language as a whole to determine the Legislature's intent. See Madugula v Taub, 496 Mich at 696. Given the expansive definitions accorded to "operate" and "vehicle" under existing law, extending the statute to encompass the area in question would improperly lead to absurd results. People v Tennyson, 487 Mich 730, 741, 790 NW2d 354, 361 (2010) ("Statutes must be construed to prevent absurd results.") For instance, a citizen who was consuming, or had consumed, alcohol while cleaning out the interior of his or her

Co v Old Republic Ins Co, 466 Mich 142, 146; 644 NW2d 715 (2002) (noting that courts must avoid an interpretation that would render any part of the statute surplusage or nugatory).

This court should refuse to extend the statute to criminalize the conduct at issue in the instant matter because, given the particularity and specificity with which the Legislature has set out the areas upon which drunk driving is prohibited, to do so would amount to an enlargement of the statute rather than a construction of it. Moreover, an absent phrase should not be read into the statute, as to do so would effectively rewrite the law, which the Legislature specifically enacted. See Hanson v Mecosta Co Road Comm'rs, 465 Mich 492, 504; 638 NW2d 396 (2002) (noting that a court's function in interpreting a statute is not to independently assess what would be most fair or just or best public policy," but "to discern the intent of the Legislature from the language of the statute it enacts").

As indicated by the above, it is clear that the Legislature did not intend to prohibit the operation of a vehicle while intoxicated in the area in question. MCL 257.625 should not be interpreted in a manner that is contrary to the intent of the Legislature. Accordingly, Defendant-Appellee requests that this Court decline to grant the relief requested by

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vehicle (with the keys in the ignition and/or the vehicle on) on the upper portion of his or her private driveway may be subject to prosecution. See, e.g., City of Plymouth v Longeway, 296 Mich App 1, 11; 818 NW2d 419, 424 (2012). Also, the law may extend to a disabled citizen in an electric scooter, who after consuming alcoholic beverage(s), decides to proceed outside and spend some time in his or her yard (through which the driveway extends), as he or she may be deemed to be operating a "vehicle" while intoxicated in violation of MCL 257.625(1). See, e.g., People v Lyon, 310 Mich App 515, 872 NW2d 245 (2015) (holding that electric four-wheeled scooter that intoxicated disabled driver was operating on public highway while drinking beer was a "vehicle" within meaning of statutory prohibitions against operating vehicle while under influence of alcohol, even if scooter qualified as electric personal assistive mobility device, low-speed vehicle, or moped, and even though scooter substituted as a wheelchair). It is clear that the Legislature did not intend to criminalize such conduct when enacting the relevant statutory provision.

Plaintiff-Appellant.

3. A VIOLATION OF MCL 257.625(1) CONSTITUTES A CRIMINAL OFFENSE AND THEREFORE PRINCIPLES OF LENITY SHOULD BE APPLIED BY THE COURT AND ANY OUTSTANDING AMBIGUITY SHOULD BE RESOLVED IN FAVOR OF DEFENDANT-APPELLEE.

As indicated by the aforementioned analysis, a finding that the upper portion of Mr. Rea's private residential driveway, which is encompassed within the side-yard and/or back-yard of his residence, does not constitute an "[other] [place] generally accessible to motor vehicles" under MCL 257.625(1), is warranted. However, if this Court concludes that the statutory phrase is ambiguous and remains uncertain as to the meaning of the same, principles of lenity warrant that the statutory provision be interpreted in favor of Defendant-Appellee.

Lenity principles "demand resolution of ambiguities in criminal statutes in favor of the defendant." See United States v Granderson, 511 US 39, 54 (1994) ("In these circumstances — where text, structure, and [legislative] history fail to establish that the Government's position is unambiguously correct — we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor"); see also, Rewis v United States, 401 US 808, 812 (1971) ("[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."); People v Sartor, 235 Mich App 614; 599 NW2d 532 (1999) (If there is any doubt as to whether an act charged is embraced within a statute, the doubt must be resolved in favor of the accused.) The reasons underlying the rule of lenity include the following: (1) "'fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed;'" and (2) "'legislatures and not courts should define criminal activity.'" Ratzlaf v United States, supra

at 148-49, quoting Boyle v United States, 283 US 25, 27 (1931).

The prohibition against operating a vehicle while intoxicated is contained within the Michigan Vehicle Code. See MCL 257.625. However, the relevant statutory provision establishes and defines a criminal offense and a violation of MCL 257.625(1) constitutes a "crime." See MCL 750.5 (A "crime" is defined as "an act or omission forbidden by law which is not designated as a civil infraction, and which is punishable upon conviction by [imprisonment]."); see also, MCL 257.625(9) (noting that a violation of MCL 257.625(1) is a "misdemeanor" punishable by "imprisonment" for not more than 93 days). Therefore, MCL 257.625 may properly be considered a penal or criminal statute and lenity principles may be applied by this court in resolving the present dispute. Accordingly, in the instance that the Court finds the statutory phrase and/or provision to be ambiguous, this Court should apply principles of lenity and construe the same in Defendant-Appellee's favor.

RELIEF REQUESTED

As indicated by the aforementioned analysis, the upper-portion of Defendant-Appellee's private residential driveway, which is encompassed within the back-yard and/or side-yard of his residence, does not constitute an area that is "generally accessible to motor vehicles" under MCL 257.625(1). The area upon which Defendant-Appellee is alleged to have operated a vehicle on the date in question does not fall within the purview of MCL 257.625. Accordingly, Defendant-Appellee respectfully requests that this Court decline to grant the relief requested by Plaintiff-Appellant and affirm the majority decision of the Michigan Court of Appeals.

CAMILLA BARKOVIC (P-78254)
Attorney for Defendant-Appellee
25805 Harper Avenue
St. Clair Shores, Michigan 48081
586/773-2120

Dated: November 10, 2016

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

GLEICHER, P.J., JANSEN, AND SHAPIRO, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v.

GINO ROBERT REA,

Defendant-Appellee.

Supreme Court
Case No.: 153908

Court of Appeals
Case No.: 324728

Oakland County Circuit Court
Case No.: 14-250517-FH

DEFENDANT-APPELLEE'S APPENDIX LIST

APPENDIX A - EXHIBITS FROM TRIAL COURT

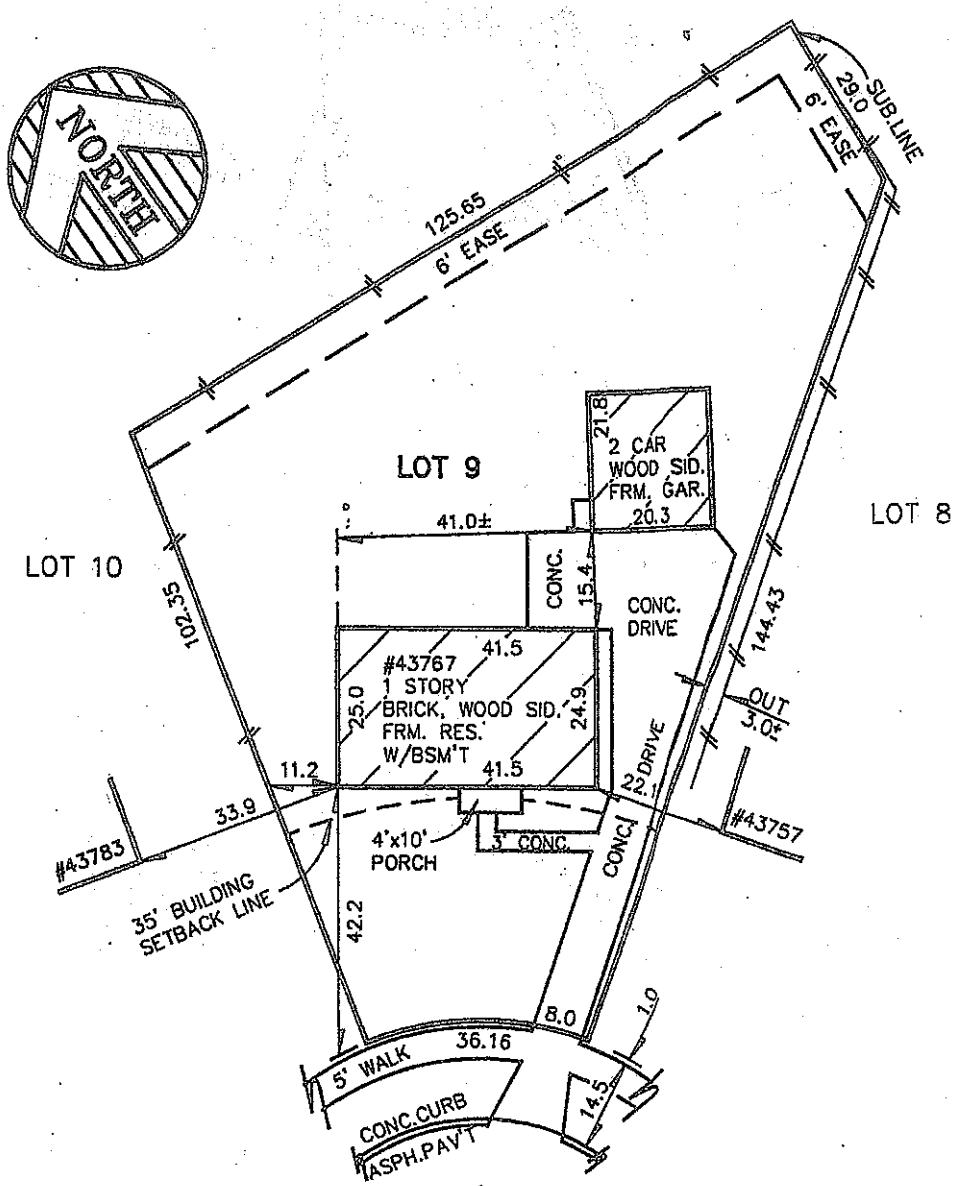
APPENDIX B - HOUSE BILL 4351 LEGISLATIVE ANALYSIS

APPENDIX A

EXHIBITS FROM THE TRIAL COURT

MORTGAG

PENGAD-Bayonne, N. J.
DEFENDANT'S EXHIBIT
A



NOTE:
Due to snow cover some surface level features may not be shown, such as Conc. & Asph. etc.

CERTIFICATE: We hereby certify that we have surveyed the above-described property in accordance with the description furnished for the purpose of a mortgage loan to be made by the forementioned applicants, mortgagor, and that the buildings located thereon do not encroach on the adjoining property, nor do the buildings on the adjoining property encroach upon the property heretofore described, except as shown. This survey is not to be used for the purpose of establishing property lines, nor for construction purposes, no stakes having been set at any of the boundary corners.

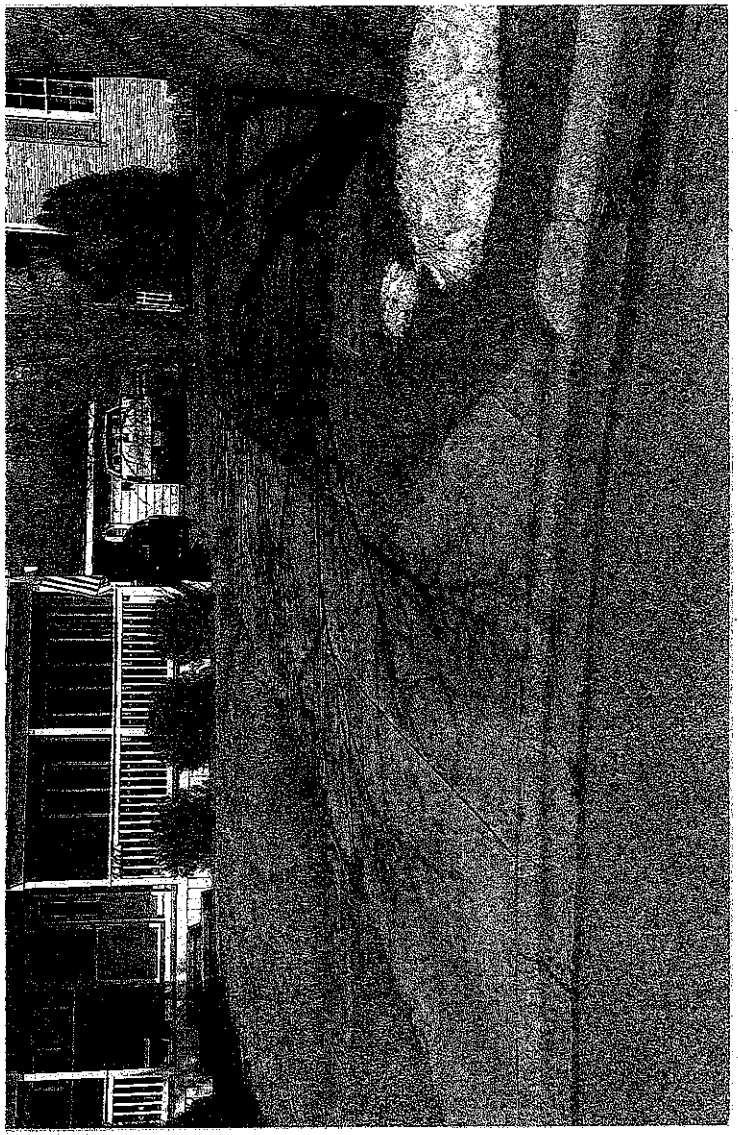
STATE OF MICHIGAN
SHANE P. AZBELL
PROFESSIONAL SURVEYOR
No. 46724
LICENSED PROFESSIONAL SURVEYOR

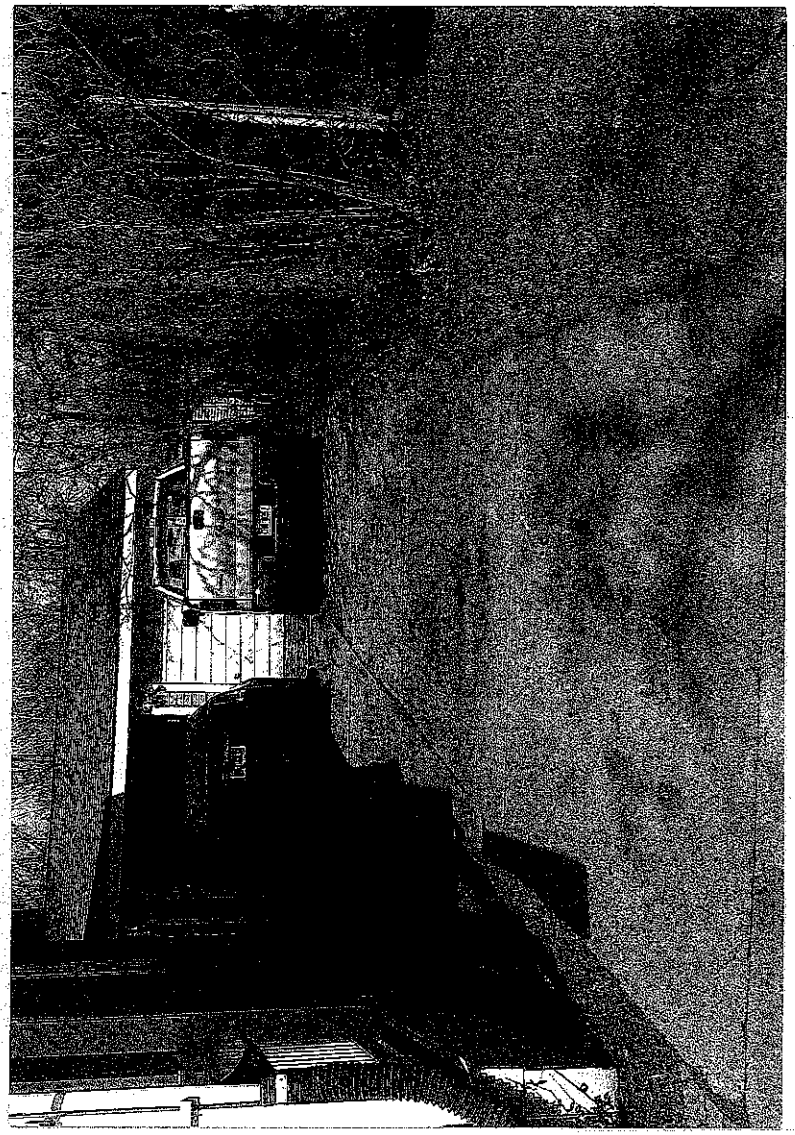
Shane P. Azbell

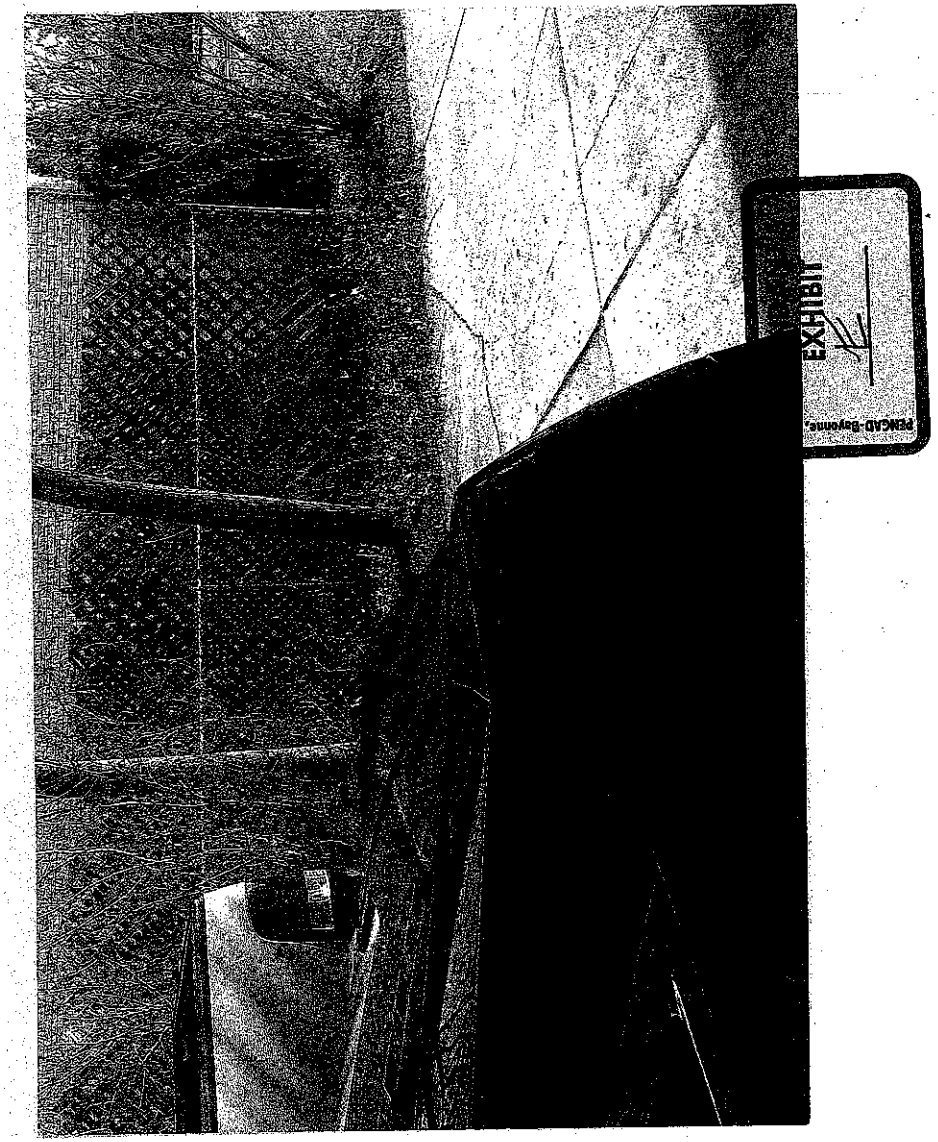
JOB NO: 01-02924 SCALE: 1"=30'
DATE: 2/7/01 DR BY: LAO

KEM-TEC
LAND SURVEYORS
22556 Gratiot Avenue
Eastpointe, MI 48021-2312
(810) 772-2222
FAX: (810) 772-4048

KEM-TEC WEST
LAND SURVEYORS
800 E. Stadium
Ann Arbor, MI 48104-1412
(734) 994-0888 • (800) 433-6133
FAX: (734) 994-0667







APPENDIX B

HOUSE BILL 4351 LEGISLATIVE ANALYSIS

House
Legislative
Analysis
Section

Olds Plaza Building, 10th Floor
Lansing, Michigan 48909
Phone: 517/373-6466

COMM'L. DRUNK DRIVING RULES

House Bill 4160 (Substitute H-1)
Sponsor: Rep. Michael E. Nye

House Bill 4351 (Substitute H-1)
Sponsor: Rep. Floyd Clack

First Analysis (5-9-91)
Committee: Transportation

THE APPARENT PROBLEM:

The Commercial Motor Vehicle Safety Act was enacted in 1986 to put into federal law more stringent truck safety provisions and, along with federal rules adopted in 1988, requires states to enact similar laws or else forfeit future transportation funding. Michigan complied in 1988 when the Michigan Vehicle Code was amended (under Public Act 346) to conform to federal standards for such things as the licensing of commercial drivers, keeping records of these commercial drivers and conveying this information (via computer) to the U.S. Department of Transportation, and various other truck safety issues. Provisions relative to drunk driving by commercial drivers, however, were not included in the act as the federal law dealt in a limited way with this issue; instead, federal rules were adopted late in 1988 which specifically addressed the issue. These rules specify that states have until October 1, 1993 to adopt laws that parrot federal drunk driving standards for commercial truckers, and the Department of State has thus requested legislation to accomplish this goal.

THE CONTENT OF THE BILLS:

The Michigan Vehicle Code specifies that a person is guilty of operating a motor vehicle while under the influence of intoxicating liquor (OUIL) if he or she is found to have a blood alcohol content (BAC) of .10 percent or higher while driving, and also allows a person to be stopped and ticketed for driving while impaired (meaning a person's ability to operate a vehicle safely is visibly impaired even though his or her BAC is below the legally defined OUIL limit). Habitual offenders can have their licenses suspended or revoked. These provisions now apply equally to all drivers, including to persons who operate commercial motor vehicles. The bills would add to the act more stringent drunk-driving standards for drivers of commercial vehicles and stricter penalties for a person convicted of operating a commercial motor vehicle in violation of the bill's provisions. Specifically, House Bill 4160 would prohibit operation of a commercial vehicle on state roadways with a BAC of .015 percent or more, but specifies that a person who violated this provision would not be guilty of either a civil infraction or criminal violation of the act. However, House Bill 4351 provides that a person who operated a commercial motor vehicle with a BAC of .04 percent but not more than .07 percent would be subject to certain penalties provided for under the bill. The bills are tie-barred to each other and would take effect January 1, 1993.

House Bill 4351 would amend the vehicle code (MCL 257.320a and 257.625m) to prohibit a person (whether licensed or not) with a BAC of .04 percent but not more than .07 percent from operating a commercial motor vehicle in the state. The bill would permit a police officer, without a warrant, to arrest a person if the officer had reasonable cause to believe the person was, at the time of an accident, the driver of a commercial motor vehicle involved in the accident who was driving in violation of the bill or a local ordinance substantially corresponding to the bill.

A person convicted of violating the bill or a similar law would be guilty of a misdemeanor and could be punished by imprisonment for up to 90 days or a fine of $300, or both, together with costs of the prosecution. As part of the sentence, the court would order the secretary of state to suspend the person's driver's license as specified elsewhere in the act. The court could not order the secretary of state to issue a restricted license that would permit the person to drive a commercial motor vehicle.

A person who violated the bill or a similar law within 10 years of a prior conviction (including a conviction in another state) could be sentenced to imprisonment for up to one year or a fine of up to $1,000, or both. As part of the sentence, the court would have to order the secretary of state to revoke the vehicle group designations on the person's driver's license as provided for in the act.

House Bill 4106 would amend the vehicle code (MCL 257.7a et al.) to include in the act tougher enforcement provisions relative to drunk-driving by commercial drivers and to add other general amendments.

Suspension, Revocation of License. The bill would require the secretary of state to suspend a commercial driver's license (for as little as one year or for life, depending on the violation or number of occurrences) of a person upon notice from a court or administrative tribunal that the person was responsible for violating certain drunk-driving laws, or that the person had refused the request of a police officer to submit to a chemical test of his or her blood, breath, or urine that could determine the person's BAC or presence of a controlled substance or both while the person was driving a commercial motor vehicle. The bill would prohibit operation of a commercial vehicle with a BAC of .015 percent or more, but specifies that a person who failed to comply with this provision would not be guilty of a civil infraction or criminal violation of the act.

The secretary of state would have to revoke all vehicle group designations on a person's driver's license for at least 10 years and until the person was approved for driver's licensing upon notification that a person had been convicted, or notice that a court or administrative tribunal had found the person responsible for one or more of various drunk-driving violations within a 10-year period. The bill would add to the list of violations that would trigger this provision two separate incidents of refusing to submit to a chemical test to determine the alcohol or controlled substance content of the blood. A determination by a court of original jurisdiction or by an authorized administrative tribunal that a person had violated the law would be considered a conviction.

Breath Test, Out-of-Service Order. The bill would permit a police officer to request a preliminary chemical breath test if the officer had reasonable cause to believe a person had been operating a commercial motor vehicle while he or she had any detectable presence of alcohol, or the person's blood contained any measurable amount of alcohol by weight. A person believed to be operating a commercial vehicle in violation of the .015 percent BAC maximum, or a commercial vehicle driver who refused to submit to a preliminary chemical test, would have to be issued an immediate 24 hour "out-of-service" order by a police officer. A preliminary breath test could be used to issue an out-of-service order to the person. A person so ordered could not drive a commercial motor vehicle during the 24-hour order period, and violation of an out-of service order would be a misdemeanor. Also, an officer who issued such an out-of-service order would have to provide for the safe and expeditious disposition of a hazardous material carried by the vehicle that could damage the vehicle, human health, or the environment.

Reciprocity with Other States. If an applicant for an original vehicle group designation was previously licensed in another jurisdiction, the secretary of state would have to request a copy of the applicant's driving record from that jurisdiction. If the applicant had his or her license suspended, revoked, cancelled or denied for reasons identified in the act, or if he or she had a history of other driving problems in his or her home jurisdiction, the secretary of state would have to cancel all vehicle group designations on the person's driver's license. Certain reasons for which the secretary of state would have to cancel vehicle group designations would not apply to an applicant for an original vehicle group designation who at the time of application had a valid class 1, class 2, or class 3 indorsement under the act or a valid commercial driver's license issued by any other state.

Limited Appeal, Restricted License Denied. A person convicted of violating provisions of House Bill 4351 or certain provisions of House Bill 4106 would only be entitled to an appeal based on the merits of the action; an appeal based on a convicted person's hardship could not be made. The bill would prohibit the secretary of state from issuing a restricted commercial driver's license if a person refused to take a chemical test while operating a commercial motor vehicle. The bill would require a court to order the department to suspend the commercial driver's license of a person convicted of violating certain drunk-driving laws while driving a commercial motor vehicle. Also, the department could not issue a restricted commercial driver's

license, nor could the court require the secretary of state to issue a restricted commercial driver's license, to such a person.

Other Provisions. The bill specifies that a person who operated a commercial motor vehicle in the state after any of the following had occurred would be guilty of a misdemeanor and could be imprisoned for not less than three days or more than 90 days, or be fined not more than $100, or both:

* If the person's vehicle group designation was suspended or revoked and he or she had been notified of this by the secretary of state;
* If a person's application for a vehicle group designation had been denied; or
* If a person had never applied for a vehicle group designation.

The act currently exempts certain persons from the licensing requirements. The bill would add an exemption for a person who was taking a road test with a certified examiner appointed by the Department of State.

Currently, a group A vehicle designation is required to drive a vehicle towing another vehicle with a gross vehicle weight rating (GVWR) over 10,000 pounds, and a group B designation is required before operating a single vehicle or a combination of vehicles with a GVWR over 26,000 pounds when the towed vehicle's GVWR is 10,000 pounds or less. Specific tests for each of these group designations is required before a vehicle can be operated. The bill specifies that a person who took the driving test required for a group A designation in a combination of vehicles having a gross combination weight rating (GCWR) less than 26,001 pounds could not operate a single vehicle with a GVWR of 26,001 pounds or more, or any combination of vehicles with a GCWR of 26,001 pounds or more if the vehicle being towed had a GVWR of 10,001 pounds or more or the towing vehicle had a GVWR of 26,001 pounds or more.

Someone with a group B vehicle designation that was not restricted under the act and who took the driving test required for a group A designation in a combination of vehicles with a GCWR under 26,001 pounds could not operate any combination of vehicles with a GCWR of 26,001 pounds or more if the towed vehicle had a GVWR of 10,001 pounds or more. And, finally, someone who took the driving test required for a group B vehicle designation in a combination of vehicles in which the towing vehicle had a GVWR under 26,001 pounds could not operate a single vehicle with a GVWR of 26,001 pounds or more, or any combination of vehicles if the towing vehicle had a GVWR of 26,001 pounds or more.

BACKGROUND INFORMATION:

A similar set of bills, House Bills 4284 and 4307, were introduced in the 1989-90 legislative session and passed the House, but were not enacted.

FISCAL IMPLICATIONS:

The Department of State says the bills would have minimal fiscal impact to that department and to the Department of State Police depending on the number of drunk driving violations by commercial drivers that occurred under the bill. The Department of State Police would have increased enforcement costs and the secretary of state would have additional costs in processing paperwork related to any increase in the number of driver violations that occurred under the bill. According to a department spokesman, drunk driving violations by commercial drivers that would have to be enforced and processed are not expected to go up dramatically under the bill. (5-7-91)

ARGUMENTS:

For:

The bills would make the state's laws regarding drunk driving by commercial drivers conform with the federal mandate contained in the Commercial Motor Vehicle Safety Act of 1986 and subsequent 1988 rules. The standards adopted at the federal level are designed to reduce the misuse of alcohol by commercial drivers, and the state is required to adopt laws that meet these standards by April 1, 1992 or risk losing federal transportation funds. The .04 maximum BAC level specified in the bill was established after months of review and analysis by the National Academy of Science. As large commercial motor vehicles require a great deal of skill and presence of mind to operate competently, it is reasonable to expect that drivers of these are held to more stringent standards.

Response:

A drunk driver behind the wheel of a "small," non-commercial vehicle presents as much of a danger as a drunk commercial driver and should be held to the same standards. While the .04 percent BAC

federal mandate for states applies only to commercial drivers, the state should go one step further and apply this standard to all drivers.

Against:

House Bill 4160 would require the secretary of state to revoke a person's commercial driver's license if the person was convicted of two drunk driving violations within 10 years of each other, which means the department would only have to keep records on each individual for 10 years after a first violation. According to a department spokesman, this provision may conflict with guidelines set forth under federal rules which require states to maintain records of certain drunk driving offenses indefinitely. Under federal rules, a second violation would result in a lifetime suspension regardless of the number of years between the first and second violations.

POSITIONS:

The Department of State supports the bills. (5-7-91)

The Department of State Police supports the bills. (5-7-91)

The Michigan Trucking Association supports the bills. (5-8-91)

Mothers Against Drunk Driving (MADD) supports the bills. (5-8-91)